

1 HONORABLE JAMES L. ROBART
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9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
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14 MONTY J. BOOTH, ATTORNEY AT LAW,) NO. 2:13-cv-01533-JLR
15 P.S., a Washington corporation, individually)
16 and on behalf of a class of Washington) **DECLARATION OF ANTHONY
businesses similarly situated,) FISCHER**
17 Plaintiff,)
18 v.)
19 APPSTACK, INC., a Delaware corporation;)
20 STEVE ESPINOSA, individually; and JOHN)
21 ZDANOWSKI, individually,)
22 Defendants.)
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25 I, Anthony Fischer, declare as follows:
26

1. I am over the age of 18 and I make this declaration based on my personal knowledge and
experience of approximately 20 years in the telecommunications industry. Attached
hereto as **Exhibit A** is a true and correct copy of my current resumé.
2. I graduated from Clark College in June 1996 with two Associate of Applied Science
Degrees, one in Telecommunications Engineering Technology and the other in

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Electronics Engineering Technology. I also graduated with two certificates of competency: Telephone Technician and Novell Networking Technology.

3. After graduating from Clark College I began working for GST Telecom, which is now TW Telecom. I have been continuously employed by this company since graduating from Clark College and have been working in the telecommunications industry for approximately 20 years. Beginning in 2008, through today, my title has been "Voice Application Engineer."
4. My duties and responsibilities throughout this time period relate to various facets of the telecommunications industry. More specifically, my knowledge and experience relates to complex voice applications. In other words, I am a sales engineer whose primary job duties include but are not limited to:

- Understanding customers' voice needs and requirements;
- Understanding carrier networks and how they relate;
- Understanding current telephony environment;
- Understanding current product offerings and technical capabilities;
- Understanding high-availability and high-volume voice traffic applications, such as auto-dialers, short-duration traffic, call center traffic, and contact center traffic;
- Understanding and interpretation of customers' invoices, call-detail records, traffic reports, and auto-generated auto-dialer reports.

5. As a part of my duties and responsibilities, I am regularly tasked (on a near weekly-basis) with reviewing and analyzing call-detail records associated with and produced by various auto-dialers. Generally, the types of records produced by auto-dialers are similar in both

format and the types of information they contain. Typically, these records include information related to the date and time of outbound calls, to/from calling party, minutes of usage, time zones, "verticals," agent name, and telephone number(s) "dialed." Based on my review of the documents in this case, including **Exhibit B** ("inContact Scope Statement"), **Exhibit C** (APPSTK000042-APPSTK000046)¹, and **Exhibit D** (INCONTACT_001401) attached hereto, I conclude that the dialer call detail records in this case are similar to the call-detail records I regularly review. As such, they are limited in the types and amount of information they contain.

6. My understanding is that the auto-dialer in this case was provided by inContact, Inc. As part of my analysis, and for my own understanding of the product and services at issue, I researched inContact, Inc. on the internet. I learned that inContact, Inc. is a company that provides cloud contact center technology and solutions. They appear to be a "pay as you go" company. In other words, a customer can purchase software that enables them to access a hosted predictive dialer or auto-dialer (*i.e.* in the cloud) and then as business needs grow, they can layer in solutions like integrated voice response systems ("IVRs"), automated call distribution systems ("ACDs"), cloud contact center software, reporting and analytics, and even proprietary features like personal connection which places a live

¹ My review of the call-detail records in this case was not limited to the abbreviated documents attached as **Exhibit C** and **Exhibit D**, respectively. My review and analysis included a review of a large number of the corresponding full call-detail records associated with each of the aforementioned sets of records (*i.e.* Appstack's call-detail records and inContact's call-detail records). Due to the volume, a complete set of these documents has not been attached to this declaration but will be produced with my expert file. The documents I reviewed to support my findings and opinions in this report are: (1) the Appstack call-detail records, attached hereto as **Exhibit C**; (2) the inContact call-detail records, attached hereto as **Exhibit D**; (3) the inContact Scope Statement, attached hereto as **Exhibit B**; (4) inContact-Appstack Service Contract and invoices to Appstack, attached hereto as **Exhibit E**; and (5) my written notes, attached hereto as **Exhibit F**. All of these documents have been attached to this declaration with the exception, as set forth above, of full sets of the Appstack and inContact call-detail records which simply contain too many pages. I also reviewed inContact's website to support my findings and opinions.

1 agent on the call as soon as it is answered. With the hosted dialer software, such as the
2 auto-dialer in this case, the customer can load scripts into the dialer, use multi-number
3 dialing for each customer, and control what number is sent out by the dialer as caller-ID
4 on outbound dialer calls. Based on my analysis of the pertinent case documents I was
5 tasked to review, I have determined that the customer's (*i.e.* Appstack) invoices and
6 service contract, attached hereto as **Exhibit E**, are consistent with a product known as a
7 "hosted predictive dialer" and that Appstack appears to have layered in additional
8 features, including but not limited to local access DIDs, toll free numbers, and agent
9 hosted VoIP to the overall service package purchased from inContact.

10

11 7. For this litigation I was tasked with reviewing and assessing records and documentation
12 related to the claims in this action including, for example **Exhibit C** and **Exhibit D**
13 attached hereto, related to call-detail records. Specifically, reviewing records generated
14 by the alleged auto-dialer used by Defendants in this action and determining, based on
15 my knowledge and experience, whether using those records would permit a determination
16 that a phone call was terminated (*i.e.* received) in the State of Washington.

17

18 8. Based on my understanding and experience, as well as a review of the relevant records
19 provided to me, including **Exhibit B**, **Exhibit C**, and **Exhibit D**, I conclude to a
20 reasonable degree of scientific certainty that the telephone numbers listed on the call-
21 detail logs do not necessarily correlate with an outbound phone call from the auto-dialer
22 being terminated in the State of Washington. In other words, from the relevant records in
23 this litigation I conclude there is no way to determine whether an outbound call made by
24 the auto-dialer was physically terminated to a service or handset (*i.e.* desk phone, cell
25

1 phone, or soft phone²) in the State of Washington. In fact, the records do not demonstrate
2 the outbound calls made by the auto-dialer terminate to a physical service location in the
3 State of Washington.

4 9. In today's telephony environment, telecommunications carriers can provide virtual or
5 foreign-exchange numbers that terminate on a physical circuit not located in the same
6 market as the number plan administrator ("NPA")/number exchange ("NXX") (*i.e.*
7 telephone number). For example, a customer in the state of New York could order
8 Seattle, Washington associated telephone numbers (*i.e.* with a Washington State area
9 code) that terminate to a telecommunications circuit located in the state of New York. In
10 this example, customers utilizing an auto-dialer would have no knowledge of where the
11 Seattle, Washington telephone numbers, once dialed, actually terminate. The auto-dialer
12 does not have the intelligence to distinguish how the outbound call was routed through
13 the carrier after the "dial" occurred.

14 10. Similarly, the auto-dialer is not intelligent enough to recognize outbound calls that go to
15 carrier call treatment, voicemail, a forwarded end-point, calls that go unanswered and/or
16 are abandoned by the called party. In other words, there is not enough "called party data"
17 to determine if outbound auto-dialer calls actually physically terminated in the State of
18 Washington.

19 11. To make this type of determination, for each telephone number listed on the auto-dialer's
20 outbound call-detail records, I would need to be provided and review (at a minimum) the
21 following documents:

22 26 ² A "soft phone" refers to a program, such as Cisco IP Communicator, that runs on a desktop computer, laptop, or

- A list of customer names and associated telephone numbers that correspond to the outbound call-detail records;
- Billing invoices from the called party's service provider (*i.e.* telecommunications service provider, such as Verizon, etc.) detailing the telephone number, and where the telephone number physically terminates (*i.e.* carrier service location);
- A product catalog from called parties' service providers detailing availability of supported telephone numbers, such as virtual numbers, foreign exchange numbers, and out-of-market numbers; and
- Call-detail records from called parties' service provider(s) that detail the date and time of the call allegedly received from the auto-dialer.

12. These types of documents/records listed above are not associated with, or more
13 importantly, produced by an auto-dialer. This is also true for the auto-dialer at issue in
14 this litigation as demonstrated by **Exhibit B** and **Exhibit C** and the corresponding call-
15 detail records.

16. Here, a review of the relevant auto-dialer records reflects this. The records contain only
17 limited information related to the outbound call and what happened to the outbound call
18 once the auto-dialer presented the call to the carrier for termination. The information
19 listed above (*e.g.* carrier call-detail logs) may be available and may provide assistance
20 with determining where a phone call terminated, however, this analysis would require an
21 individual examination of each of the called parties' carrier call-detail logs to determine
22

23 tablet, that acts like a physical handset (*i.e.* desktop phone). It utilizes a USB headset plugged into the computer,
24

1 where the call terminated after it was "dialed" by the auto-dialer.

2 14. For example, once the auto-dialer presents the telephone number to the carrier for call
3 termination a number of possibilities (none of which are recorded by the auto-dialer) can
4 occur. These include, but are not limited to, the following:

- 5 • Call could terminate to a called parties' telecom service in a state other
6 than Washington or could be routed over the customers' wide-area
7 network ("WAN") for termination within the State of Washington;
- 8 • Even with a State of Washington area code/telephone number
9 ("NPA/NXX") being dialed by the auto-dialer, the call could terminate to
10 a forward to location (including to a soft phone) that is not located in the
11 State of Washington; and/or
- 12 • Even with a State of Washington area code/telephone number
13 ("NPA/NXX") being dialed by the auto-dialer, the call could be answered
14 in a state other than Washington (*i.e.* in a state other than what the
15 telephone number represents it to be).

16 15. The auto-dialer records in this case do not address any of the issues listed above relating
17 to what happens with the call once the telephone number has been dialed by the auto-
18 dialer.

19 16. In fact, telephone numbers in the current telephony environment, especially for
20 businesses, are designed to give customers full control of outbound and inbound caller
21 identification ("caller-ID"). Furthermore, voice applications such as voice over IP
22

1 ("VoIP"), contact center applications, and outbound auto-dialer campaigns utilize
2 telephone numbers that are provided with mobility and flexibility in mind. In other
3 words, customers want telephone numbers that can provide a virtual presence but be
4 physically used by the customer in any location around the United States. This design,
5 supported by telecommunications carriers, allows for the manipulation of telephone
6 numbers, especially with respect to caller-ID associated with the far-end (*i.e.* called
7 party).

9 17. The relevant call-detail records in this action demonstrate how telephone numbers can be
10 manipulated, for example **Exhibit C**. Based on my experience and knowledge with auto-
11 dialers, **Exhibit C** does not appear to represent the call-detail records documenting called
12 party information, however, it is also possible that they do. This because the "Term
13 Number" column listed on the records in **Exhibit C**, generally, is associated with the
14 same number being called multiple times per second on different dates and time.
15 Generally, the dialer is scripted to dial one number then move onto the next, not
16 repeatedly call the exact same number over and over. With this in mind, and based on
17 my experience and knowledge of auto-dialers and the records they generate, **Exhibit C**
18 appears, at least to some degree, to list the billing telephone number ("BTN") associated
19 with calls being made by the auto-dialer and subsequently billed to the client (*i.e.*
20 Appstack). The call-detail records also appear to be associated with the auto-dialer's
21 outbound calls specifically show a billing telephone number ("BTN") in Utah, which
22 would indicate the auto-dialer is physically located in Utah. However, the originating
23 number is being manipulated to out-pulse a toll free telephone number, or a telephone
24 number with an area code associated with another state (*i.e.* Texas), on the customer's
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1 behalf. The "Orig Number" on the other hand, appears to demonstrate the telephone
 2 number that would be displayed at the far end (*i.e.* called party) caller-ID display. This
 3 would represent the desired call back number for the customer (*i.e.* Appstack) and would
 4 permit the far end user receiving the call to see and have a record of the calling party's
 5 "number." It is my understanding that Appstack was, at all relevant times, located in
 6 Temecula, California, however, displaying the customer's (*i.e.* Appstack) toll free
 7 number provides a way for the called party to call-back Appstack, at no charge to the
 8 called party. It would be of no benefit to the customer (*i.e.* Appstack) if the called party
 9 was not able to call-back and reach an Appstack customer service agent. It is possible
 10 that the toll free number displayed on the called party's caller-ID points to an Appstack
 11 telephone number provided on service in Temecula, California. Based on the above, I
 12 cannot determine with certainty whether the call-detail records from Appstack, such as
 13 **Exhibit C**, are actual call detail reports documenting called party information; they may
 14 be, they may not be. Even if they are in fact call-detail records indicating called party
 15 information in the "Term Number" column, they do not remedy the problems set forth
 16 above associated with determining where the call terminated once the "dial" occurred.

17
 18. The call-detail records provided by inContact, Inc. ("inContact") do not remedy the
 19 problems set forth above either. **Exhibit D** is an example of these records. Based on my
 20 experience and knowledge with auto-dialers and the records produced by auto-dialers, the
 21 information contained in **Exhibit D** does not allow for a conclusive determination as to
 22 where the alleged auto-dialer outbound calls physically terminated. Nor does the
 23 information contained within **Exhibit D** allow for a determination of whether the
 24 telephone numbers listed with Washington State area codes are actually associated with
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 26

1 telecommunications services in the State of Washington. The reason is because of the
2 capabilities and technologies available in the modern telephony environment, a number
3 of which are set forth above.

4 19. My compensation rates for this litigation are \$225/hour for work related to case reviews,
5 document review, and meetings/calls with counsel, and \$275 per hour for deposition and
6 trial testimony.

7
8
9 I declare under the penalty of perjury that the foregoing is true and correct to the best of
10 my knowledge.

11
12 Dated this 3 day of October, 2014.

13
14 By: Anthony Fischer
15 Anthony Fischer, Declarant
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1
2
3 CERTIFICATE OF SERVICE
4

5 I hereby certify that on December 8, 2014, I served **DECLARATION OF ANTHONY**
6 **FISCHER** on:

7 **Via ECF Filing**
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22 *Co-Counsel for Plaintiff*

23 _____ by mailing to each of the foregoing a copy thereof, placed in a sealed envelope addressed
24 as listed above and deposited in the United States mail at Portland, Oregon, and that
25 postage thereon was fully prepaid.

26 _____ by facsimile transmission to each of the foregoing of a copy thereof to the number shown
27 above.

28 _____ by hand delivering to each of the foregoing a copy thereof to the address listed above.

29 by electronic means through the Court's Case Management/Electronic Case File system
30 on the date set forth above.

31 Dated this 8th day of December 2014.

32 SMITH FREED & EBERHARD, PC

33 By: /s/Anne Cohen
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36 Of Attorneys for Defendants
37 Appstack, Inc., Steve Espinosa and
38 John Zdanowski

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40 CERTIFICATE OF SERVICE -1 No. 3:13-cv-01533-JLR

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